90-1820 (1)

Supreme Court, U.S.
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CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MILES SPEAR,

Petitioner,

vs.

ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; AMALGAMATED LOCAL 887-UAW, an unincorporated labor union; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), an unincorporated labor union; AL YBARRA; DAVID BUCK and DOES 1 through 100, inclusive,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MILES SPEAR, Appearing Pro Se

I am my own attorney of record and am appearing pro se. My address and telephone number for all purposes are:

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QUESTIONS PRESENTED

(1) Whether Article V, @18(b) in the collective bargaining agreement ("Master Agreement") of Rockwell and the UAW, (which confines remedial relief, regardless of the time period suffered or actual monetary loss involved, to a period not exceeding 30 days prior to the date of filing the grievance), excuses exhaustion of contractual remedies on the basis of inadequacy of remedy?

(2) Whether state causes of action for Intentional Infliction of Emotional Distress, Conspiracy To Commit the Intentional Infliction of Emotional Distress, Fraudulent Misrepresentation and Negligence based on the concerted actions of Rockwell and union defendants are preempted by federal labor law as "inextricably intertwined" with an interpretation of the provisions of the Master Agreement?

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STATUTE

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(b) and (c), 29 U.S.C. 401. 6,7,8
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UNITED STATES DISTRICT COURT

Local Rule 7.16. 19

UNREPORTED CASE

This case was not reported at either the District Court or Ninth Circuit Court of Appeals level.

JURISDICTIONAL BASIS

The date of entry of judgment of the Ninth Circuit U.S. Court of Appeals is February 22, 1991.

The judgment of the Ninth Circuit is reviewable by this Court pursuant to 28 U.S.C. @1331 involving federal questions.

PERTINENT STATUTE

The pertinent statute involved in the preemption question is The Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 USC 401 et al., including:

(1) Declaration of Findings, Purposes and Policy (29 U.S.C. 401):

"Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to

protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of

individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefor, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor-Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended...".

(2) 73 Stat. 533; 29 U.S.C. 411; Title

I, @ 101(a)(2):

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions...".

(3) 73 Stat. 522 & 523; 29 U.S.C. 411; Title I, @101(a)(4):

"No labor organization shall limit... the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding...".

(4) 73 Stat. 523; 29 U.S.C. 411; Title I, @101(a)(5):

"No member of any labor organization may be fined, suspended, expelled, or otherwsie disciplined except for nonpayment of dues by such organizations or by any officer thereof unless each member has been (A) served with written specific charges; (B) given a reasonable opportunity to prepare his

defense; (C) afforded a full and fair hearing".

(5) 73 Stat. 523; 29 U.S.C. 412; Title I, @102:

"Any person whose rights secured by the provisions of this Title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate...".

(6) 73 Stat. 540; 29 U.S.C. 523(a); Title VI, @523(a):

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or the laws of any State, and, except as explicitly provided to

the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State".

(7) 73 Stat. 541; 29 USC 529; Title VI, @609:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any agent thereof to fine, suspend, expel or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section".

STATEMENT OF THE CASE

Petitioner has been a Rockwell aerospace employee and union member since 1961. He has held various Local 887 representative

capacities, including more recently, Zone Committeeman, wherein grievances of his constituency are first reported to him, he consituting the initial step in the Master Agreement grievance process. As a Zone Committeeman in the Los Angeles Division, Petitioner had dedicated himself to fair and impartial service to his constituency, much to the annoyance of Local 887, who, collectively calling themselves the Blue Slate, wanted favoritism shown to their "loyal" followers.

Between November 25, 1986 and October 11, 1988, the Blue Slate and Rockwell, mostly in concert, acted in the following pattern:

(1) Petitioner was bogusly "excessed" from two job classifications of Tube Mock-Up Mechanic (11/25/86) and Expediter-Sr. (12/6/88), eventually being downgraded to Stock Clerk (2/28/88), so he could be demoted to lesser paying jobs as punishment

for his being a fair and equitable Zone Committeeman. During this process, he was promised his official classification would be changed to Expediter-Sr. (where he enjoyed actual seniority) but this never occurred. About three months after being excessed from Tube Mock-Up Mechanic, the position was reinstated by Rockwell and the most senior employee was recalled to the position (3/7/87).

(2) On March 3, 1988, an election combining five zones into one was "rigged" so that Petitioner lost and was henceforth immediately laid off effective March 7, 1988. Having lost his status as an elected Local 887 rep, Petitioner could no longer exercise "superseniority" and since at his ultimate classification as Tube Mock-Up Mechanic he did not have actual seniority, he could not avoid layoff.

(3) The Blue Slate used defendant Buck

at least three times (on 7/87, 2/8/88 and 2/28/88) to threaten Petitioner with denials of transfer and loss of the election, the latter time assuring him that the union would see to it that he would also be put out on the streets. In fact, Petitioner requested transfers on 4/9/87 and 7/87 and was denied without legal justification.

(4) Further, Petitioner, in May of 1987, advised one of his constitutents, Eugene Geisler, who, while running for office was threatened with denial of his transfer request should he stay in the race, to complain to the National Labor Relations Board ("NLRB"), which Geisler did and wherein Petitioner testified at the hearing. There was an attempt made by the Blue Slate to instigate a Local 887 investigation and discipline Petitioner for this advice, although it was later withdrawn. It is submitted that this was a major factor,

however, in the Blue Slate deciding to remove Petitioner from the plant.

The NLRB itself found in favor of Geisler and against Local 887. In Case #31--CB--7088 dated February 18, 1988, Administrative Law Judge Harold A. Kennedy found that: "Respondent [Local 887], acting through its agent, Jerry Giron, on or about 18 May 1987 violated @8(b)(1) of the National Labor Relations Act by threatening to affect Eugene H. Geisler's employment with Rockwell International should Geisler run for union office."

(4) During 6/87 or 7/87, defendant Ybarra, in his capacity as Local 887 President, ordered Petitioner, while picking up a plaque for a retiree as a rightful exercise in his role as Zone Committeeman, to stay out of the Local 887 union hall without legal justification,

(5) When Petitioner protested his

election "loss" on March 12, 1988, he was ruled untimely by the Election Committee (although he clearly was timely), which was chaired by the very same Buck, who also participated in the voting. The protest was based, inter alia, on votes being counted more than once, retirees being allowed to vote (after being treated to a picnic by the Blue Slate), of the ballot box being placed in a jail cell out of view of observers designated by the candidates and so forth.

(6) The aforementioned activities were spaced in such a way as to not show an immediately discernible pattern and, technically speaking, adequate relief would have been unavailable through Art. V, @18(b), which states:

"In no event shall any decision or award upon any problem or grievance filed by any employee or the Union under Article V or VI be made effective for any period beyond

thirty (30) calendar days prior to the date such problem was first recorded in accordance with Article V or VI."

However, grievances were eventually filed but determined to be untimely by the Regional Director of the UAW, who, curiously enough, backtracked on his earlier position because he had to first pre-approve the grievance before it reached the International level it was rejected at. Not by the company, but by his unilateral act. At that point in time in the process, Rockwell would have been deemed to have "waived" that defense.

In its Order re Summary Judgment entered October 17, 1989, the District Court for the Central District of California, which acquired jurisdiction pursuant to 29 USC 185(a) of the Labor-Management Relations Act of 1947, 29 USC 411 et al. of the Labor-Management Reporting & Disclosure Act of

1959, and 42 USC 185 & 186, dismissed the state claims without prejudice on preemption grounds and claims for Breach of Collective Bargaining Agreement and Breach of Duty of Fair Representation were granted summary judgment [and also dismissed without prejudice] on grounds that complete relief was available under the standard of Clayton v. Automobile Workers, 451 U.S. 679, 692 (1980) in that a wrongly decided grievance could be reactivated under written agreement between the union and company and that Petitioner had not exhausted his contractual remedies.

Petitioner noted to the court in his Motion To Alter or Amend Judgment pursuant to FRCP 59(e) that it had failed to address his arguments re Art. V, @18(b), which would render exhaustion moot as an inadequate remedy as a matter of law (and certainly judicial discretion) and beyond the subject-

matter jurisdiction of the collective bargaining process.

The district court wrongfully treated said motion as one for reconsideration under both 59(e) and Central District Local Rule 7.16 and in its Order Re Plaintiff's Motion For Reconsideration entered January 22, 1990, the court treated the provision as a Statute of Limitation, despite language in Art. V, @18(a)(1) that clearly designates a five-day period from discovery or when the offense should be discovered as a limitations period. The court said Petitioner's claim that the defendants' unfair conduct "became overt only after an overview of accumulated acts is novel, but insufficient to override the pragmatic limitation set in Article V."

In a Memorandum entered on February 22, 1991, the Ninth Circuit, exercising jurisdiction under Federal Rule of Appellate

Procedure 4(a)(3), rubber stamped the orders of the District Court.

ARGUMENT

The Ninth Circuit ruling contradicts established case law, both Ninth Circuit and U.S. Supreme Court. When a remedy is clearly inadequate (or futile), case law states that an exhaustion of remedies may be excused at the discretion of the trial judge, the denial of which, of course, may constitute an abuse of discretion, which is claimed here. Clayton, supra, at p.692; Scoggins v. Boeing Co., Inc., 742 F.2d 1225, 1229 (9th Cir. 1984); Retana v. Apartment, Motel & El. Op. U., Loc. No. 14, 453 F2d 1018, 1025 (9th Cir. 1972). As previously alluded to, the pattern far exceeds the thirty day parameter and should be viewed as being beyond the subject-matter jurisdiction of the collective bargaining process to consider, as any remedy reflecting lost

backpay and promotional opportunities would be woefully inadequate when confined to the thirty days.

The district court analysis, which the Ninth Circuit embraced, wrongly approaches breach of duty of fair representation on the basis of breach re negotiations of the provisions of the Master Agreement, which was never espoused by Petitioner and misses the point entirely. Allegations of such were absent in the complaint because that notion, although a valid basis in case law for asserting the breach, is irrelevant to these proceedings.

The district court also analyzes in terms of whether Art. V, @18(b) was "arbitrary per se". Although this is closer to the point, it still misses the mark, as Petitioner's assertion is that the remedial scope of the provision renders the process incapable of providing an adequate remedy as a matter of

law in his specific case and hence, exhaustion of contractual remedies is excused.

Since the remedial scope of the collective bargaining process itself is inadequate, the fact that the UAW and Rockwell have agreed that reinstatement of a wrongfully decided grievance is available should the UAW in its intra-union Constitutional appellate process so determine begs the question.

As to the insufficiency itself of a thirty-day remedy provision to the facts of the instant case, this would seemingly be supported by this Court's rulings in Clayton, supra, at p.292 and and Vaca v. Sipes, 386 U.S. 171, 186, 17 L.ed.2d 842, 87 S.Ct. 903 (1967).

In particular, Vaca, at 186, states:

> "We cannot believe that Congress, in conferring upon employers and unions

> the power to establish grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such breaches." (Emphasis added).

To process Petitioner's grievance with the thirty-day restriction operative allowed both entities "unfettered discretion" to wrongfully delimit his relief in frustration of traditional, long-recognized contractual remedies. The proper thing to have done was for the union and/or company to tell Petitioner from the start that the collective bargaining process was inadequate and unequipped to handle his problem to

begin with and that any relief desired should be sought through the judicial system.

The Master Agreement provision previously alluded to, Art. V, @18(a)(1), reads:

"(a) There is no responsibility on the Company to make any adjustment of any problem (1) Unless it is presented within one hundred and twenty (120) hours after the occurrence of the acts or omissions of the company which are the basis of the problem unless the circumstances of the case made it impossible for either the employee or the Union to know that he had grounds for such a claim prior to that date, in which event it must be presented within one hundred and twenty (120) hours after either party first knew of such act or omission...".

Clearly, that is the limitations provision of the Master Agreement, not Art. V, @18(b), which serves as a scope of remedy

only. Both the District Court and Ninth Circuit ignored this salient point although vigorously asserted in Petioner's Motion To Amend or Alter Judgment and District Court oral argument.

Re preemption, the complained of acts fall outside the scope of the Master Agreement and should be allowed re Allis-Chalmers v. Luek, 401 U.S. 202, 210, 211 & 213, 105 S.Ct. 1904, 85 L.ed.2d 206 (1985), as they are not "inextricably intertwined" but rather "tangential" and peripheral.

They are, in fact, more in line with the causes of action for Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress and Defamation upheld in Tellez v. Pacific Gas And Electric Company, Inc., 817 F.2d 536 (9th Cir. 1987). Tellez was suspended without pay for 10 days on suspicion of buying cocaine on the job and a letter of suspension was sent to 12

company managers. Despite his even prevailing on a union grievance, his causes of action were permitted in a federal suit.

In sum, federal questions, especially regarding inadequacy of remedy and therefore excuse as to an exhaustion of contractual remedies, have been decided by the Ninth Circuit in a way that conflicts with applicable decisions of this Court (and even the Ninth Circuit itself), a strong consideration for granting review pursuant to Rule 10(c) of this Court.

DATED: May 20, 1991.

Respectfully submitted,

By: Miles Spear
Miles Spear, Petitioner

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILES SPEAR,	)	No. 90-55300
Plaintiff-Appellant,	)	
v.	)	D.C. No. CV-
ROCKWELL INTERNATIONAL	)	88-5505-WDK
CORP.; AMALGAMATED LOCAL	)	
887-UAW; INTERNATIONAL	)	ENTERED FEB
UNION, UNITED AUTOMOBILE,	)	22, 1991
AEROSPACE AND AGRICULTURAL	)	
IMPLEMENT WORKERS OF	)	
AMERICA (UAW); AL YBARRA;	)	
DAVID BUCK, and DOES 1	)	
through 100, inclusive,	)	MEMORANDUM*
Defendants-Appellees.	)	

Appeal from the United States District Court for the Central District of California

William D. Keller, District Judge, Presiding

Argued and Submitted February 6, 1991

Pasadena, California

Before: GOODWIN, HUG and FARRIS, Circuit Judges.

Plaintiff-Appellant Spear brought this action against Rockwell International Corporation, the Local and International Unions and the officials of the unions, setting forth seven causes of action. These causes of action, as set forth in the complaint, are: (1) breach of collective bargaining agreement; (2) breach of the duty of fair representation; (3) intentional infliction of emotional distress; (4) conspiracy to intentionally inflict emotional distress; (5) violation of the Labor-Management Reporting and Disclosure

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit R 36-3.

Act ("LMRDA"); (6) fraudulent misrepresentation; and (7) negligence. The district court dismissed Spear's claims for breach of the collective bargaining agreement, breach of the duty of fair representation, and violation of the LMRDA due to Spear's failure to exhaust contractual and internal union appeals procedures. Further, the district court dismissed Spear's state law claims as preempted by federal law.

We affirm the judgment of the district court for the reasons set forth in the thorough and well-reasoned Memorandum Opinion as modified in the order denying Plaintiff's Motion for Reconsideration under Fed.R.Civ.P. 59(e).

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILES SPEAR, Plaintiff, v. ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; AMALGAMATED LOCAL 887-UAW, an unincorporated labor union; INTERNATIONAL UNION; UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), an unincorporated labor union; AL YBARRA; DAVID BUCK and DOES 1 through 100, inclusive. Defendants.	) Case# CV 88-5505 WDK (Sx)) ORDER RE PLAINTIFF'S MOTION FOR RECONSIDERATION [Fed.R. Civ.P. 59(e)]) ENTERED JAN 22 1990

Before the Court is plaintiff Miles Spear's motion to alter or amend this Court's judgment entered October 17, 1989,

granting defendants' respective motions for summary judgment. Plaintiff contends that the Court failed to address his argument that Article V, section 18(b) of the Collective Bargaining Agreement (Contract) was so restrictive as to render exhaustion of the remedies provided by the Contract futile, opening the way for plaintiff to bring his claim in this Court.

Fed.R.Civ.P. 59(e) and Central District Local Rule 7.16 permit a party to move for reconsideration upon a showing of: (1) material differences of law or fact from those presented at the hearing which could not have been known to the parties; (2) the emergence of new facts or a change of law after a hearing; or (3) a failure to consider material facts presented to the court at the hearing. Plaintiff appears to request reconsideration for failure to consider a material argument presented at

the hearing. The rules are not, however, intended to permit a party to reassert arguments made previously which have failed. See Backlund v. Barnhart, 778 F.2d 1386,1388 (9th Cir.1985). Plaintiff's motion is appropriately denied in this instance as redundant of argument already urged upon the Court.

Plaintiff's claim is substantively unavailing. While plaintiff did in fact raise his argumetn at the hearing that the limitations of Article V, @18(b) excuse the requirement of exhaustion of remedies, the Court did not address this argument in its fourteen page opinion granting summary judgment for defendants. Because the argument based in Art. V, @18(b) requires different analysis than those which were directly addressed in the Court's previous written ruling, the Court will briefly set forth the reasons why plaintiff's argument

is substantively rejected.

Plaintiff contends that Article V, @18(b), is insufficient to provide an adequate remedy for concealed acts of discrimination or mistreatment which ought to be remediable through the arbitration process. Article V, @18(b) provides:

"(b) In no event shall any decision or award upon any problem or grievance filed by any employee or the Union under Article V or VI be made effective for any period beyond thirty (30) calendar days prior to the date such problem was first recorded in accordance with Article V or VI."

Master Agreement, Art.V, @18(b) at 33. Plaintiff contends that this clause is so oppressive as to make any attempts to arbitrate grievances futile per se. In substance, the argument is that the Union breached its duty of fair representation in negotiating this clause with Rockwell. This

claim, of course, is not remediable through the untra-union appeals process, as that process affords no means of amending or altering the collective bargaining agreement itself. Thus, there is no necessity to exhaust contractual remedies in cases where the plaintiff argues that the Union breached its duty of fair representation by negotiating a particular agreement. See Williams v. Pacific Maritime Association, 617 F.2d 1321,1328-29 (9th Cir.1980) (Kennedy, J.), cert. denied, 449 U.S. 1101 (1980); Beriault v. Local 40, ILWU, 501 F.2d 258,266 (9th Cir. 1974).

The Court must then look past the exhaustion requirement to the merits of plaintiff's claim. Defendants' motions for summary judgment should be granted only if there is no genuine issue of material fact which could otherwise entitle plaintiff to relief. Anderson v. Liberty Lobby, Inc.,

477 U.S. 242,248 (1986).

In order to state an actionable claim for breach of the duty of fair representation in the negotiation of a labor contract, plaintiff must allege that the negotiations which took place were "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967); Williams v. Pacific Maritime Assn., 617 F.2d at 1330; Beriault v. Local 40, 501 F.2d at 263. The Court must examine whether plaintiff has in the complaint or subsequent pleadings alleged any bad faith, discrimination, or arbitrariness or whether the time limitation can be considered arbitrary per se.

Plaintiff has set forth no allegations whatsoever of inadequate representation by the Union in the negotiation to include Article V, @18(b). Indeed, this challenge to the Union's duty is not germane to the other allegations in the Complaint which

relate to more recent and specific acts of the Union and Rockwell, entirely unrelated to the Contract negotiations. Absent any allegations that the negotiations [emphasis original] were administered in breach of the Union's duty, the Court must grant summary judgment in favor of defendants.

Nor can the Court conclude from the face of @18(b) that it is arbitrary per se. As a matter of practical administration, the Union and the Employer must set limitations on the advancement of claims against the Union or Rockwell. A thirty-day limitation gives ample time for an employee to assess a potential grievance and determine whether or not he wishes to pursue it. Plaintiff's argument that defendants' unfair conduct toward him became overt only after an overview of accumulated acts is novel, but insufficient to override the pragmatic limitation set in Article V. Under

plaintiff's view, there would be no respite from a potential onslaught of grievances over conduct which had transpired long ago. The rule setting a time limit on the receipt of employee grievances would be entirely meaningless. The limitation in @18(b) is reasonable, and rationally related to a legitimate administrative function in the grievance procedure. See Williams v. Pacific Maritime Association, 617 F.2d at 1331.*

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* 1. The Contract is not so inflexible or unforgiving as to not make allowance for excusable failure to press a grievance. Its time limits provide:

(a) There is no responsibility on the Company to make an adjustment of any problem

(1) Unless it is presented within one

(footnote continued following opinion)

Consequently, plaintiff's motion for reconsideration is DENIED on both procedural

and substantive grounds. Plaintiff's motion reiterates arguments already presented and considered. It it therefore not properly raised under Fed.R.Civ.P. 59(e). Furthermore, plaintiff's argument is substantively insufficient for failure to allege bad faith, discrimination or arbitrariness in the Union's negotiation of the Master Agreement, Article V, section 18(b).

Finally, plaintiff has urged this Court to consider the allocation of costs under Fed.R.Civ.P. 54. The Court does not have before it a petition to assess costs, however. The determination would therefore be premature.

IT IS SO ORDERED.

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one hundred and twenty hours (120) after the occurrence of the acts or omissions of the Company which are the basis of the problem

unless the circumstances of the case made it impossible for either the employee or the Union to know that he had grounds for such a claim prior to that date, in which event it must be presented within one hundred and twenty (120) hours after either party first knew of such act or omission. [Emphasis original].

Master Agreement, Art.V, @18 (emphasis added). Thus the Contract establishes a reasonable method whereby grievances may be filed more than 120 hours after the fact, if the failure to so file is reasonably excused. Given the leniency afforded by section 18, the outermost limitation on the filing of grievances in section 18(b) cannot be seen as so oppressive as to constitute a breach of the Union's duty to fairly represent its members in negotiating the labor Contract.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILES SPEAR,	)	Case# CV 88-
Plaintiff,	)	5505 WDK(Sx)
v.	)	
ROCKWELL INTERNATIONAL	)	ORDER RE
CORPORATION, a Delaware	)	SUMMARY
corporation; AMALGAMATED	)	JUDGMENT
LOCAL 887-UAW, an unin-	)	
corporated labor union;	)	ENTERED OCT
INTERNATIONAL UNION,	)	17, 1989
UNITED AUTOMOBILE, AERO-	)	
SPACE & AGRICULTURAL IMPLE-	)	
MENT WORKERS OF AMERICA	)	
(UAW), an unincorporated	)	
labor union; AL YBARRA;	)	
DAVID BUCK and DOES 1 and	)	
100, inclusive,	)	
Defendants.	)	

MEMORANDUM AND OPINION

BACKGROUND

Defendants ROCKWELL INTERNATIONAL CORPORATION ("Rockwell"), LOCAL 887-UAW and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ("UAW") have moved this Court for summary judgment to dismiss all of the claims in plaintiff's complaint. The complaint alleges seven causes of action. They are: (1) Breach of the Collective Bargaining Agreement or the "Master Agreement" (against Rockwell and UAW); (2) Breach of the Duty of Fair Representation (against UAW); (3) Intentional Infliction of Emotional Distress (against Rockwell and UAW); (4) Conspiracy to Commit Intentional Infliction of Emotional Distress (Rockwell and UAW); (5) Breach of the Labor Management Reporting and Disclosure Act of 1959, LMRDA, 29 USC @@101 et seq. (Rockwell and UAW); (6) Fraudulent Misrepresentation (Rockwell and

UAW); and (7) Negligence (Rockwell and UAW).

These allegations stem from a series of events which culminated in plaintiff's dismissal from Rockwell in March of 1988. Up to thattime, plaintiff claims he had been mistreated by UAW and Rockwell, through their officers and agents, who denied him rights due under the Master Agreement, abridged his rights as a Union member, and failed to address his grievances about these concerns on the merits. However, in their motions for summary judgment, defendants have raised important preliminary issues as to the plaintiff's duty to exhaust contractual and internal Union procedures before bringing an action into federal court. Additionally, defendants have argued that the state claims are preempted under federal labor law. Therefore, before proceeding to the merits of plaintiff's factual allegations, the Court must consider

these issues.

DISCUSSION

Count one of the complaint alleges breach of the Master Agreement. This suit arises under Section 301 of the Labor Management Relations Act. In Republic Steel Corporation v. Maddox, the Supreme Court held that prior to commencing an action alleging a breach of a labor contract, "individual employees wishing to assert contractual grievances must attempt use of the contract grievance procedure agreed upon by the employer and Union as to the mode of redress." 379 U.S. 650,652 (1965). Plaintiff Spear's grievances for each of five complained of acts by the Union and Rockwell were rejected: four for failure to file timely, one for failure to raise a legitimate claim of right. Article VI of the Master Agreement provides a system of comprehensive appeals from a decision to

deny an employee's prayer for relief on a grievance. This appeals process is crowned by access to an arbitration panel whose duty it is to give final consideration to an employee-employer dispute. See Master Agreement, Art. VI, @12. Mr. Spear did not take the road to arbitration provided for in the Master Agreement. See Spear deposition, vol. 1, pp. 120-21. Thus, the contractual remedies were not exhausted. Cf. Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

Failure to exhaust, however, may be excused where, as here, it is not the mployee himself but the Union that has sole power to invoke arbitration under the collective bargaining agreement. Master Agreement, Art. VI, @12. The employee can obtain judicial relief for breach of the labor contract only if he first shows that the Union wrongfully refused to seek

arbitration. Vaca v. Sipes, 386 U.S. 171, 185 (1967); Clayton v. Gilfillan, 623 F.2d 563, 568 (9th Cir. 1980), aff'd in part, rev'd in part and remanded sub nom. Clayton v. Automobile Workers, 451 U.S. 679 (1981). If the Union's allegedly wrongful decision not to pursue the grievance can be addressed within the Union, the employee must attempt to exhaust internal Union procedures before taking his claim against the Union and the employer to federal court. Clayton v. Automobile Workers, 452 U.S. 679, 687-693 (1980); See also Morris, 2 THE DEVELOPING LABOR LAW at 1285-1304 (2d. ed. 1983).

"Where internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases,

the internal union procedures are capable of resolving meritorious claims short of the judicial forum. *** [I]f the employee obtained reactivation of the grievance through internal union procedures, the policies underlyikng Republic Steel would come into play, and the employee would be required to submit his claim to the collectively bargained dispute resolution procedures."

Clayton v. Automobile Workers, 451 U.S. at 692; see also id. at n.20. In Clayton the UAW was unable to reinstate the grievance of employees who succeeded on appeal. This was fatal to the exhaustion requirement, as even a meritorious appeal was fruitless. In the present case, however, Rockwell and the UAW have an understanding that the UAW may reinstate an employee's grievance if, after review and appeal, it is determined that disposition of that grievance was wrongfully

effected by the Union. See Decl. of Robert St. Pierre, Exhibit A, Paragraphs 2-3. Consequently, a UAW internal appeal could provide complete relief under the Clayton standard. Mr. Spear was therefore required to attempt use of the internal appeals procedure to get his Union to act before bringing a Section 301 action against Rockwell.

Count two against UAW and Local 887 alleges breach of the duty of fair representation. In order to bring an action against the Union for breach of this duty, however, the plaintiff must again attempt to exhaust the internal procedures of the Union. Clayton v. Automobile Workers, 451 U.S. at 689.

The UAW has a thoroughgoing system of internal review. The UAW Constitution, Article 33, provides an appeal to three levels, the final appeal being to the

Convention Appeals Committee or Public Review Board. Article 33 also states that the internal Union appeals process is an exclusive remedy and must be exhausted before any Union member goes to a civil court or administrative body for redress. UAW Constitution, affidavit of Carolyn Forrest, Exhibit 1 at 86. It is undisputed that Mr. Spear did not attempt to exhaust the appeals process provided for in the Union Constitution. See Affidavit of Klein at 3; Affidavit of Forrest at 3, Spear deposition, vol. 1, pp. 120-120.

This failure would ordinarily be dispositive of Mr. Spear's claims in count one and two. However, whether exhaustion is required in a particular case is left to the sound discretion of the trial court. Fristoe v. Reynolds Metal Co., 615 F.2d 1209, 1214 (9th Cir. 1980). This discretion is exercised with an eye toward three

considerations: (1) whether Union officials are so hostile to the employee that the employee could not obtain a fair hearing; (2) whether the internal Union appeals procedures would be inadequate either to reactivate the employee's grievance or to accord the employee the full relief sought under Section 301; and (3) whether exhaustion would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits. Clayton v. Automobile Workers, 451 U.S. at 689; Scoggins v. Boeing Co., Inc., 742 F.2d 1225, 1229 (9th Cir. 1984). Whether the employee was aware of the internal procedures is also merits consideration. Fristoe v. Reynolds, 615 F.2d at 1214 (knowledge of procedures not required).

This inquiry goes into the question whether pursuit of the internal procedures would be, in practice, futile. Scoggins,

742 F.2d at 1230. Once the Union comes forward showing that adequate internal remedies are available, the burden shifts to the employee to prove that the pursuit of these remedies would have been futile, and that exhaustion should be excused. Id. at 1230.

The second consideration raised in Clayton is satisfied. As noted previously, Rockwell has a comprehensive system of internal appeals. Mr. Spear, as a former committeeman, was aware of this system. Spear deposition, vol. 1, pp. 120-21. Rockwell and UAW have agreed that an employee's successful appeal within the Union. Thus, the internal Union process provides a complete remedy upon successful appeal.

As to the third prong, plaintiff has made no indication that the procedure would cause an unreasonable delay, prejudicing his right

to seek civil relief. Article 33, sections 3&4(c) set strict time limits for appeals. See Lynn v. Sheet Metal Workers' International Association, 804 F.2d 1472, 1484 (9th Cir. 1986), aff'd, ____U.S.___, 109 S.Ct. 639 (1989).

Finally, plaintiff sets forth allegations of hostility. Those allegations center on the conduct of Mr. Ybarra, President of the Local 887-UAW, and Dave Buck, Chairman of Local 887 Election Committee. There is a further allegation of hostility on the part of Mr. Brasfield, an assistant to a Vice-President at International who corresponded with Mr. Spear. That correspondence concerned an earlier incident where Mr. Spear advised a co-worker to take his grievance directly to the NLRB, as opposed to proceeding within the Union's internal system. Mr. Brasfield said:

"We are concerned, however, when an in-

plant Committeeperson [referring to Spear] directs a member to go to the NLRB rather than advising one to exhaust internal Union remedies as provided in Article 33, section 5, of the Constitution of the International Union, UAW. An investigative committee to ascertain relevant facts was judgment call [sic] and should not be viewed from a negative stance."

Brief in Opposition to Motion for Summary Judgment, exhibit 2025. That letter, however, is in conformity with Union policy. Section 5 of Article 33 requires exhaustion of Union remedies before members resort to administrative or civil tribunals for redress of internal protests. The request framed in the letter also conforms with national policy encouraging private resolution of labor disputes wherever internal procedures are capable of resolving meritorious claims short of the judicial

forum. Clayton v. International Union, 451 U.S. at 692. The Court is not convinced that this letter evidences hostility sufficient to deem the appeals process futile. "For there to be an adequate demonstration of hostility, it must appear that persons involved in the intra-union appeals procedure are hostile toward the union member..." Hayes v. Brotherhood of Ry. & Airline Clerks, 734 F.2d 219, 220 (5th Cir. 1984), quoted in Scoggins v. Boeing Co., Inc., 742 F.2d at 1228, n.6.

The degree of hostility, if any, manifested by Ybarrra, Buck, and Brasfield need not be decided at this juncture. Plaintiff has presented no evidence of any animosity or hostility on the part of the panels which sit at the highest levels of intra-union appeal. Absent any allegation to that effect, plaintiff's futility argument is legally insufficient to excuse

exhaustion of internal procedures. Ritza v. International Brotherhood of Longshoreman's & Warehouseman's Union, et al., 837 F.2d 365, 370 (9th Cir. 1988) ("[t] district court's conclusion that any hostility that may exist at the [lower level] is cured by the availability of neutral arbitration was neither clearly erroneous nor incorrect as a matter of law")(citation omitted); Lynn v. Sheet Metal Workers, 804 F.2d at 1484; Hayes v. Brotherhood of Ry. & Airline Clerks, 734 F.2d at 220 (must show hostility in "intra-union appeals procedure"). There being an inadequate showing of futility, plaintiff's claims for relief in counts one and two are dismissed for failure to exhaust internal Union and contractual remedies.

Plaintiff in count five alleges against Rockwell and the Union several violations of the Labor Management Reporting and Disclosure Act of 1959, 29 USC @101 et seq.

As Rockwell demonstrated in its motion for summary judgment, the complaint on that count contains no allegations pertaining to Rockwell or its agents. The complaint has therefore, as a matter of law, fails to state a ground upon which relief may be granted against Rockwell.

Count five also alleges LMRDA violation against UAW. 29 USC section 411(a)(4) provides that a Union may require that members exhaust internal procedures before instituting legal or administrative proceedings. Article 33, section 5 of the UAW Constitution does just that. The requirement of "exhaustion of intra-union remedies before intervention by a federal court is 'most absolute where the complaints allege wrongdoing regarding internal union affairs.'" Bise v. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, 618 F.2d 1299, 1303 (9th Cir.

1979), cert. denied, 449 U.S. 904. As in the exhaustion requirements prerequisite to bringing counts one and two, an employee may be excused from the exhaustion requirement upon a showing of futility; whether that showing has been made is a decision left to the discretion of the trial court. Id. Plaintiff's allegations of futility have been previously discussed and are insufficient to excuse exhaustion on the grounds of futility. Plaintiff's claims under the LMRDA, then, are similarly barred for failure to pursue internal Union procedures.

Plaintiff's third, fourth, sixth and seventh causes of action assert violation of several state causes of action. These claims present a more difficult question. The issue is whether these state law causes of action are preempted by federal labor law. Initially, the Court notes that the

preemptive force of Section 301 is so powerful as to displace entirely any state claim based on a collective bargaining agreement and any state claim whose outcome depends on analysis of the terms of the agreement. Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1,23 (1982); Stallcop v. Kaiser Foundation Hospital, 820 F.2d 1044, 1048 (9th Cir. 1987). Thus, state law causes of action which are "inextricably intertwined" with consideration of the terms of the labor contract are preempted by Section 301. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1984).

The most recent pronouncement from the Supreme Court on the preemptive force of Section 301 came in Lingle v. Norge Div. of Magic Chef, Inc., ___ U.S. ___, 108 S.Ct. 1877 (1988). There the Court said that state law is preempted if it requires

interpretation of the collective bargaining agreement. Id., ___ U.S. ___ at ___, 108 S.Ct. at 1883-85. It is unclear to what extent this test is different from that set forth previously in Allis-Chalmers v. Lueck, preempting state claims which are "substantially dependent" on analysis of the collective bargaining agreement. 471 U.S. at 220. Because Lingle post-dates Allis-Chalmers, this Court is obliged to spply the latter standard. Nonetheless, the Court undertakes this task with an eye toward the substantial dependence test. See Newberry v. Pacific Racing Association, 854 F.2d 1142, 1147 (9th Cir. 1988) (applying both).

Plaintiff has presented in counts three and four claims for intentional infliction of emotional distress and conspiracy to inflict emotional distress, respectively. These counts both incorporate the allegation from count one for breach of the collective

bargaining agreement. Defendants suggest that the incorporation of the allegations alone compels a ruling that the state claims are preempted. Defendants, however, overstate the preemptive force of Section 301. Mere commonality of facts underlying the state claim and the federal claim does not require the conclusion that the state claims are preempted. Lingle v. Norge, 108 S.Ct. at 1883. The question is whether the state claims require interpretation of the labor agreement. Id.

The allegations which are incorporated into plaintiff's claims for intentional infliction of emotional distress pertain to Rockwell's decisions to twice "excess" plaintiff into new job positions, Rockwell's refusal to transfer plaintiff as he requested, and finally the decision which led to plaintiff's layoff. More than just requiring the same analysis of facts, these

claims necessarily require an inquiry into whether the acts alleged were justified under the terms of the Master Agreement. This is the holding of Newberry v. Pacific Racing Ass'n, 854 F.2d at 1149-50. See also Hyles v. Mensing, 849 F.2d 1213, 1216 (9th Cir. 1988) (emotional distress claim preempted under Section 301). Counts three and four are preempted by federal law.

Count six alleges fraudulent misrepresentation. This claim also incorporates the allegations from the first count, as well as the third. Additionally, plaintiff alleges that he was assured by a Rockwell employee that he could be transferred to a new position. Complaint at Paragraph 39. Plaintiff claims to have relied justifiably on that representation.

In California, reasonable reliance is an essential element of fraud. Wagner v. Benson, 161 Cal.Rptr. 516, 522, 101 Cal.App.

3d 27 (1980). Reliance may be demonstrated to be unreasonable in light of plaintiff's knowledge and intelligence. Id. Consequently, proof of plaintiff's reasonable reliance will require inquiry into the terms of the collective bargaining agreement. That inquiry will focus not only on plaintiff's knowledge but, more importantly, it will focus on whether the representation was indeed true and correct under the terms of the agreement. This evaluation of reasonable reliance necessarily demands interpretation of the Master Agreement. Stallcop v. Kaiser Foundation Hospitals, 820 F.2d at 1049; Fristoe v. Reynolds, 615 F.2d at 1211-12. Count six is preempted.

Finally, plaintiff's seventh claim alleges negligence. That claim is derived from Rockwell's and the Union's failure to adequately protect plaintiff's rights as an

employee and Union member. The scope of those rights is defined in the collective bargaining agreement; evaluation of the alleged breach is inextricably intertwined with that agreement.

Moreover, permitting a claim for negligence to stand against the Union would undermine federal law governing the duty of fair representation. "We have concluded repeatedly that mere negligent conduct on the part of a Union does not constitute a breach of the Union's duty of fair representation." Peterson v. Kennedy, et al., 771 F.2d 1244, 1253 (9th Cir. 1985), cert. den. 475 U.S. 1122 (1985). Tosustain this claim would subvert that conclusion. The negligence claim not only requires interpretation of the labor agreement, but threatens to undermine a cohesive scheme of federal labor law. Count seven is therefore preempted.

In light of the foregoing, the Court will not gratuitously address the merits of each of plaintiff's several allegations of wrongdoing. Nonetheless, the Court is concerned that labor Unions, shielded from civil interference by formidable procedural obstacles; not languish in their fundamental obligation to represent the interests of their members. The federal courts generally, and this Court specifically, will remain vigilant for abuse of the wide latitude afforded Unions in the exercise of their discretion over issues of vital concern to their constituent members.

CONCLUSION

For the reasons set forth in the preceding discussion, defendant's motions for summary judgment are hereby GRANTED. Plaintiffs claims for relief under Section 301 [count one], claim for breach of the duty of fair representation [count two], and claim for

violation of the Labor Management Reporting and Disclosure Act [count five] are DISMISSED WITHOUT PREJUDICE. Ritza v. Int. Br. of Longshoreman's & Warehouseman's U., 837 F.2d at 368-69. The state law claims [counts three, four, six and seven] are preempted as applied and are similarly DISMISSED.

IT IS SO ORDERED.

DATED: May 20, 1991.

Compiled by: Miles Spear
Miles Spear, Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I live in the County of Los Angeles, State of California, and am over the age of 18 and not a party to the within action; my ~~business~~ home address is: 1283 South Ridgeley Drive, Los Angeles, Ca. 90019.

On May 21, 1991, I served the foregoing document described as: PETITION FOR WRIT OF CERTIORARI on the interested parties in this action by placing three true copies each thereof enclosed in a sealed envelope thereon fully prepaid in the United States mail at Los Angeles, Ca., addressed as follows:

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(Federal) I declare under penalty of perjury that the foregoing is true and correct and that I acted under the direction of the Petitioner acting pro se.

EXECUTED MAY 21, 1991 AT LOS ANGELES, CALIFORNIA.

Monica Smith
Signature